1976

Archie Clarence Pace v. Brookfield Products : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ARCHIE CLARENCE PACE,

Plaintiff-Respondent,

vs.

BROOKFIELD PRODUCTS, INC. et al.,

Defendant-Appellant.

Case No. 14542

BRIEF OF APPELLANT

APPEAL FROM THIRD JUDICIAL DISTRICT COURT
OF SUMMIT COUNTY

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action against Defendant-Appellant Brookfield Products, Inc. (hereinafter referred to as defendant Brookfield) and others brought by Plaintiff-Respondent Archie Clarence Pace (hereinafter referred to as plaintiff) seeking to foreclose on a mortgage. Defendant Brookfield counterclaimed against plaintiff alleging plaintiff had acquired from but failed to pay defendant Brookfield for certain merchandise.

DISPOSITION OF CASE IN LOWER COURT

The case came before Honorable Marcellus K. Snow on plaintiff's Motion for Summary Judgment. At the close of argument, the Court granted plaintiff's Motion.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant Brookfield seeks to have plaintiff's Summary Judgment set aside, the Court's decision reversed and the case remanded for trial.

STATEMENT OF MATERIAL FACTS

Plaintiff Archie Clarence Pace brought an action against defendants Brookfield, Larry F. Pace (plaintiff's son) and Sharee F. Pace (hereinafter referred to as defendants Pace) and Kamas State Bank (hereinafter referred to as Bank), alleging that defendants Pace had executed and delivered to plaintiff a promissory note and mortgage and subsequently had defaulted thereon. Plaintiff's action was brought to foreclose on said mortgage. Defendant Brookfield and the Bank were named as parties to the action because of their alleged lien and/or interest in the property subject to the mortgage.

Defendant Brookfield answered denying each and every paragraph of plaintiff's complaint and counterclaimed against plaintiff, alleging that plaintiff had purchased and accepted from defendant Brookfield certain merchandise, the cost of which totaled $15,434.45, that plaintiff had failed to pay for said merchandise, and that plaintiff was indebted to defendant Brookfield in that amount.

Plaintiff answered said counterclaim alleging that any amounts due defendant Brookfield from plaintiff had been satisfied

and that there had been a complete accord and satisfaction.

Plaintiff later submitted interrogatories to defendant Brookfield, the questions and answers to which are as follows:

1. List all documents known to exist by the defendant, Brookfield Products, Inc., which show the plaintiff owes the defendant Fifteen Thousand Four Hundred Thirty-Four and 35/100 ($15,434.35) Dollars.

Sales delivery tickets.

2. Where are said documents? Give the name and address of each person who has possession of any of said documents.

Brookfield Products, Inc., 4700 South West Temple, Murray, Utah.

3. Are the documents listed above in answer to these interrogatories all of the proof the defendant has of said debt? If there is other additional proof, state what it consists of.

No. Testimony of Brookfield personnel. Sales delivery tickets are proof the defendant has.

4. List all payments received by the defendant, Brookfield Products, Inc. on said account and answer the following: (a) Date of payment; (b) By whom paid; (c) The amount paid.

None.

5. Compute how the attorney's fees of Two Thousand Two Hundred Fifty-One and 78/100 ($2,251.78) Dollars have been computed.

Bar schedule.

6. Has the defendant ever made demand for payment on the plaintiff?

Yes.

7. If answer to Interrogatory No. (6) is in the affirmative then state the following:

(a) When was said demand made?
(b) Who made said demand?
(c) By what means was said demand made? By letter, personal contact, phone, etc.

Approximately one year and approximately eight months ago. Howard Allen. Telephone.

8. If the answer to Interrogatory No. (6) is negative then state why no demand was ever made on the plaintiff for payment of the alleged accounts.

Not applicable.

Plaintiff then made a request for admissions from defendant Brookfield, the questions and answers to which are as follows:

1. That the defendant, Brookfield Products, Inc., has in its possession ledger cards or ledger sheets showing charges, payments and balance on the Pace Account.

Admits paragraph 1 of Request for Admissions.

2. That defendant, Brookfield Products, Inc. holds a mortgage with Larry C. Pace and Sharee F. Pace, his wife, as mortgagors, said mortgage given to secure a Promissory Note in the sum of Twenty-Nine Thousand ($29,000) Dollars, said note and mortgage bearing the date of January 31, 1975.

The only reason defendant, Brookfield Products, Inc., took the mortgage from Larry C. Pace and Sharee F. Pace, his wife, was because defendant, Larry C. Pace, advised defendant, Brookfield Products, Inc., he was securing a loan to clear off the balance of the account, which he failed to do; therefore, defendant, Brookfield Products, Inc., felt it was necessary to secure some kind of security to try to force payment of the account.

3. That said note and mortgage for Twenty-Nine Thousand ($29,000) Dollars includes the Fifteen Thousand Four Hundred Thirty-four and 45/100 ($15,434.45) Dollars which defendant, Brookfield Products, Inc., claims is due them from the plaintiff.

On several occasions, defendant, Larry C. Pace, and plaintiff, Archie Clarence Pace,

requested defendant, Brookfield Products, Inc., to give plaintiff, Archie Clarence Pace, a release which defendant, Brookfield Products, Inc., refused to do inasmuch as defendant, Brookfield Products, Inc., knew nothing of the contract between plaintiff, Archie Clarence Pace and defendant, Larry C. Pace.

4. That the ledger cards or sheets show that the balance on the Archie Pace Account as of March 1, 1973, of Fifteen Thousand Four Hundred Thirty-four and 45/100 ($15,434.45) Dollars was continued in the name of Larry Pace and that the purchases, payments and credits were continued forward from March 1, 1973 the same as they had been prior to March 1, 1973.

See above answer to admission No. 2.

5. That on the theory of first in first out the obligation claimed by defendant Brookfield Products, Inc. has long since been paid and there is nothing due and owing from the plaintiff to defendant Brookfield Products, Inc.

See above answer to admission No. 3.

Plaintiff, on the basis of the pleadings, answers to interrogatories and admissions on file, brought a Motion for Summary Judgment before the Court, arguing that there was no genuine issue as to any material fact, and that plaintiff, as to defendant Brookfield, on its counterclaim, was entitled to a judgment as a matter of law. The Court, after hearing the arguments of counsel, granted plaintiff's Motion for Summary Judgment as prayed.

ARGUMENT

POINT I

THE TRANSACTION AS DESCRIBED IN AND BASED UPON THE RECORD IN THE CASE AT BAR DOES NOT CONSTITUTE AN ACCORD AND SATISFACTION INASMUCH AS:

A. THERE IS NOT AN OFFER WHICH WILL SUPPORT PLAINTIFF'S ALLEGED ACCORD

Plaintiff's theory of the case and evidently the basis for the Court's granting plaintiff's Motion for Summary Judgment is that the securing by defendant Brookfield of a mortgage from defendants Pace (plaintiff's son and daughter-in-law), under the circumstances specified in the record, constituted an accord and satisfaction, thereby releasing plaintiff from that indebtedness which was owed defendant Brookfield prior to the alleged accord and satisfaction. If this is plaintiff's theory, those elements necessary for the formation of an accord and satisfaction must be satisfied.

The law concerning the formation of an accord and satisfaction generally is that there can be no accord and satisfaction without the making of a new contract, one independent of and additional to the source, contractual or otherwise, of the disputed claim or claims. 1 Am Jur 2d, Accord and Satisfaction, §4. Utah has adopted the general rule as is indicated in Ralph A. Badger & Company v. Fidelity Building & Loan Association, 94 Utah 97, 75 P.2d 669 (1938). In Badger, defendant issued a fifty-share stock certificate to plaintiff's predecessor in interest, which certificate was subsequently surrendered and reissued in two twenty-five share certificates, one of which was acquired by plaintiff. Plaintiff's predecessor gave notice of intent to withdraw the entire matured value of the shares to defendant and this notice of intent to withdraw was deemed effective with

regard to plaintiff's subsequently acquired twenty-five share certificate. Plaintiff alleged fraud, inter alia, in the acquisition of the stock, and defendant pleaded accord and satisfaction. The Court, on appeal, indicated that the principal question was whether the evidence disclosed an accord and satisfaction and cited with approval the above rule found in Am Jur as well as several Utah cases consistent with that rule. The Court concluded that there was no accord and satisfaction binding on the plaintiff.

Defendant Brookfield would submit that the alleged accord and satisfaction in the case at bar be carefully considered to determine whether there was a new contract entered into, one that was independent of and additional to the original obligation between plaintiff and defendant Brookfield. It is elementary to the law of contracts that there must be an offer by one party and that said offer "must be so definite in its terms...that the promises and performances to be rendered by each party are reasonably certain." Restatement of Contracts, §32 (1932). Comment a. to §32 of the Restatement further provides, "The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties." There must be definiteness and certainty concerning the subject matter in order for the proposal to be construed as an offer.

In the case at bar, the record and specifically plaintiff's Answer to Defendant Brookfield's Counterclaim indicates that the

amount and value of the merchandise acquired by plaintiff from said defendant is indefinite and uncertain, said defendant alleging that plaintiff had purchased some $15,434.35 worth of merchandise and the plaintiff admitting that some purchases were made, but implying that not all of the alleged purchases were made. In order to have an effective accord, the subject matter of the offer constituting the basis for the accord must be definite and certain. In the instant case, based on the present state of the record, the subject matter, i.e., the amount and value of the indebtedness, is indefinite and uncertain, and because of this indefiniteness there is no effective offer and therefore no accord.

B. THERE IS NOT AN ACCEPTANCE WHICH WILL SUPPORT PLAINTIFF'S ALLEGED ACCORD

In Corbin on Contracts, §1277, the author states:

> No Accord and Satisfaction Without Expression of Assent.
>
> The process of making an accord, of interpreting the words and acts of the parties, and of determining the legal effect thereof, is the same as in the case of other contracts. In order that a performance rendered by an obligor shall operate as a satisfaction of the claim against him, it must be offered as such to the creditor. There must be accompanying expressions sufficient to make the creditor understand, or to make it unreasonable for him not to understand, that the performance is offered to him as full satisfaction of his claim and not otherwise. If it is not so rendered, there is no accord, either executory or executed, for the reason that there are no operative expressions of agreement -- no sufficient offer and acceptance.

The law generally is as stated by Corbin and found in 1 C.J.S. Accord and Satisfaction, §3.a. wherein it is provided:

> An accord is in essence a contract or agreement, and accord and satisfaction is found and dependent on, and results from, a contract, express or implied, between the parties, and occurs only where the parties intend it and mutually assent to it.
>
> The essentials of valid contracts in general must be present in a contract of accord and satisfaction; there must be proper subject matter, competent parties, an aggregatio mentium, or meeting of the minds of the parties, and, of course,...a proper consideration. The contract must embody a definite offer of settlement, and an unconditional acceptance of such offer according to its terms, and it must finally and definitely close the matter covered by it, so that nothing of or pertaining to that matter is left unsettled, or open to further question or arrangement. The act or acts to be done under the contract must be specified with as much certainty as in any other agreement. (Emphasis Added.)

In Harding Hotel Company v. United States Fidelity & Guaranty Company, 133 Wash. 272, 233 P. 276 (1925), plaintiff Hotel entered into an agreement with the Tacoma Cabinet Works whereby said cabinet company was to manufacture specified furniture for the hotel. Defendant became surety for any loss plaintiff might incur due to a breach of contract by the cabinet company. The furniture manufactured was defective, the cabinet company became insolvent, and plaintiff offered to compromise its damages by retaining the unpaid balance of price. Subsequently, a bank, as assignee of the cabinet company, commenced an action against plaintiff seeking to recover the balance of the purchase price of the furniture contract. The plaintiff pleaded its damages as an

offset and prevailed. As time passed, further defects of a latent nature developed and plaintiff made demand for damages against defendant. Defendant contended that there had been an accord and satisfaction, preventing plaintiff's recovery. The Court held that plaintiff's offer of compromise had never been accepted and therefore no accord and satisfaction.

Based on the above, it seems abundantly clear that there can be no accord and satisfaction without an unconditional acceptance of the offer.

In the case at bar, defendant Brookfield indicated, in its Answers to Plaintiff's Request for Admissions, that a mortgage had been taken from defendants Pace (plaintiff's son) for the reason that said defendants were securing a loan to satisfy the outstanding accounts, and defendant Brookfield wanted an attempt to insure satisfaction of said indebtedness by securing the mortgage. In said answers, defendant Brookfield further indicated that on several occasions plaintiff and defendants Pace requested that plaintiff be given a release from his indebtedness and that defendant Brookfield look to defendants Pace therefor. Defendant Brookfield consistently, and on several occasions, refused to release plaintiff from the indebtedness, and in fact, made continued demands on plaintiff to pay the indebtedness; defendants Pace, insofar as defendant Brookfield was concerned, merely became joint obligors with plaintiff. Defendant Brookfield did not accept the proposed transfer of indebtedness from plaintiff to defendants Pace and defendant Brookfield would submit a fortiori without that expression of assent there was no accord.

C. THERE WAS NOT AN EXECUTION OF THE ACCORD AND THEREFORE NO SATISFACTION

Assuming, for the sake of argument, that an accord was reached between plaintiff and defendant Brookfield, said defendant would submit that there has been no execution of the accord and therefore no satisfaction. In 1 Am Jur 2d, Accord and Satisfaction, §47, it is stated:

> The rule is universally recognized that except where the new agreement is itself accepted as a satisfaction, and except to the extent that the rule has been changed by statute, the failure to make a payment or otherwise perform an act required by a new agreement entered into in satisfaction of a debt or claim leaves such an agreement a mere executory accord, without satisfaction, and as such it constitutes no bar to the enforcement of the original claim or debt.

Restatement of Contracts, §417 (1932), is consistent with the rule jus stated and provides as follows:

> ...the following rules are applicable to a contract to accept in the future a stated performance in satisfaction of an existing contractual duty, or a duty to make compensation:
>
> (a) Such a contract does not discharge the duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective non-performance.
>
> * * *
>
> (c) If the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract.

In the case at bar defendant Brookfield alleges in its Answer and Counterclaim that plaintiff purchased and accepted

from defendant Brookfield certain merchandise, the cost of which totaled $15,434.45, that plaintiff had failed to pay for said merchandise and that plaintiff was indebted to defendant Brookfield for that amount. Plaintiff, in its Answer to the Counterclaim of Defendant Brookfield alleged satisfaction of any bills due and owing defendant Brookfield between October of 1972 and March of 1973. Plaintiff is not arguing in its Answer to Defendant Brookfield's Counterclaim that the mortgage herein referred to was itself accepted as a satisfaction. Plaintiff is arguing that there was, in fact, a satisfaction of the indebtedness itself and in light of the position taken by defendant Brookfield in its Counterclaim where it is alleged that said indebtedness had not been satisfied, a question of fact is raised.

Accordingly, defendant Brookfield would submit that there has been no execution of the accord and therefore no satisfaction.

POINT II

THE PLEADINGS, ANSWERS TO INTERROGATORIES AND ADMISSIONS ON FILE SHOW THAT THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS AND THAT PLAINTIFF WAS AND IS NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW

Rule 56(c) of the Utah Rules of Civil Procedure provides as follows:

> ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The following principles as specified in 6 Pt. 2 Moore's Federal Practice ¶56.23, state generally the guidelines that govern the granting of motions for summary judgment:

> All reasonable doubts touching the existence of a genuine issue as to material fact must be resolved against the party moving for summary judgment.
>
> It is not the function of the trial court at the summary judgment hearing to resolve any genuine factual issue, including credibility; and for purposes of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party, and the appellate court will do likewise in reviewing the trial court's grant of summary judgment. Discretion plays no real role in the grant of summary judgment; the grant of summary judgment must be proper under the above principles or the grant is subject to a reversal. The trial court may, however, exercise a sound discretion in denying summary judgment, appropriate to the case at hand, although the movant may have technically shouldered his burden.

The Utah rule first above stated is not unlike the federal rule for which Moore's principles have direct application; indeed Moore's principles reflect the position taken by the Utah Supreme Court in Tanner v. Utah Poultry & Farmers Cooperative, 11 Utah 2d 353, 359 P.2d 18 (1961), Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960), Thompson v. Ford Motor Company, 16 Utah 2d 30, 395 P.2d 62 (1964), and Frederick May & Company v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962).

Without restating the facts and argument aforesaid, defendant Brookfield would submit that there are many genuine issues as to material facts in the case at bar. The amount and value of the merchandise acquired by plaintiff from defendant

Brookfield and as a corollary thereto what payments, if any, were made by plaintiff or others toward the satisfaction of the indebtedness, the question of whether or not there is any debt owing, and the intent of defendant Brookfield in taking the mortgage from someone other than the plaintiff Archie Clarence Pace (in this case the mortgage, in fact, was taken from plaintiff's son Larry G. Pace and daughter-in-law) are all genuine issues as to material facts raised in the pleadings, answers to interrogatories and admissions on file. Defendant Brookfield would therefore submit that plaintiff, pursuant to Rule 56(c) of the Utah Rules of Civil Procedure, is not entitled to a judgment as a matter of law.

CONCLUSION

The Trial Court, based on the pleadings, answers to interrogatories and admissions on file, improperly granted plaintiff's Motion for Summary Judgment and said judgment should be set aside, the Court's decision should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Brief of Appellants was served on Plaintiff-Respondent this 28th day of May, 1976, by mailing a copy of same, postage prepaid, to his attorney, J. Harold Call, Esq., 30 North Main Street, Suite #3, Heber City, Utah 84032, and upon Elliott Lee Pratt, Esq., attorney for defendants Pace, 351 South State Street, Salt Lake City, Utah 84111, and upon Ray G. Martineau, Esq., Attorney for defendant Kamas State Bank, 36 South State Street, Salt Lake City, Utah 84111.